90-503

Supreme Court, U.S.
FILED
SEP 18 1990
JOSEPH F. SPANIOL, JR.
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NUMBER _____

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1990

THEOLA HENSON DAVIS, PETITIONER

VERSUS

AT&T INFORMATION SYSTEMS, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

Whether the Honorable Trial Judge committed reversible error in granting the defendant's Motion for Summary Judgment on the grounds that Plaintiff had not timely filed an EEOC complaint under 42 U.S.C. Sec. 2000e-5(e), and whether he was in error in holding that plaintiff had failed to create a genuine issue of material fact as to the presence of discriminatory animus in her claim of desparate treatment.

LIST OF PARTIES

The parties are named in the caption of this case. There is no parent or subsidiary listing required to plaintiff's knowledge.

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TO THE HONORABLE, THE CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE SUPREME COURT
OF THE UNITED STATES:

The Petitioner, THEOLA HENSON DAVIS, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on May 25, 1990.

QUESTIONS PRESENTED

Whether the Honorable Trial Judge committed reversible error in granting the

defendant's Motion for Summary Judgment on the grounds that Plaintiff had not timely filed an EEOC complaint under 42 U.S.C. Sec. 2000e-5(e), and whether he was in error in holding that plaintiff had failed to create a genuine issue of material fact as to the presence of discriminatory animus in her claim of disparate treatment.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Louisiana, Honorable Tom Stagg, Judge, entitled "Memorandum Ruling" is unreported and is printed in Appendix A hereto, infra, page 22. The opinion and judgment of the United States Court of Appeals for the Fifth Circuit in this matter, entered on May 25, 1990, is unreported and is printed in Appendix A hereto, infra, page 39. The certified copy of the judgment of the Fifth Circuit was issued as and for the mandate of the Court as reflected by the notice from the Clerk of the United States Court of Appeals for the Fifth Circuit. The

denial of petitioner's request for rehearing by the Fifth Circuit is also included, dated June 20, 1990, on page 57 of Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on May 25, 1990. Rehearing was denied on June 20, 1990. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1254. Original jurisdiction in the District Court was grounded under 28 U.S.C. Sec. 1343(a)(4).

STATUTES INVOLVED

The statutes involved herein are listed in Appendix A herein and are as follows: 28 U.S.C.Sec. 1343 (a)(4), 42 U.S.C. 2000e, and Rule 56 of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

Plaintiff's complaint was filed on September 14, 1987, in the Western District of Louisiana, United States District Court. Original jurisdiction was grounded under 28 U.S.C. 1343(a)(4). A Motion for Summary

Judgment was filed by Defendant on August 4, 1989, claiming that plaintiff's claim was untimely filed. Further, a second Motion for Summary Judgment was filed on September 5, 1989, alleging that pursuant to Rule 56 of the Federal Rules of Civil Procedure, there was no genuine issue as to any material fact

Plaintiff was employed on March 21, 1966, in the manufacturing area of the local AT&T plant and was upgraded twice before being promoted to section chief on September 17, 1973. On December 2, 1985, AT&T experienced a large downsizing which resulted in laying off over 3,000 employees. In addition to the layoffs, a number of section chiefs were demoted or moved to other positions. Demotion of the 35 section chiefs was done on the basis of their performance appraisal ratings and, within the group of like-rated section chiefs, by seniority.

Performance was appraised under defendant's Management Appraisal Program (hereinafter, "MAP"). Under MAP, there were

four categories of performance: (1) outstanding; (2) very good; (3) good; and (4) unsatisfactory. The "good" category was subdivided into five parts: G-1 through G-5. Performance ratings resulted from the immediate supervisor's assessment and a review by three successively higher levels of management. The appraisal process was conducted annually, usually concluding late in the year; however, with the pending work force adjustment at the end of 1985, the process was conducted in August and September of that year. On 9/30/85, Plaintiff was informed that her rating was G-4.

Lower rated section chiefs were demoted first. Since there were no section chiefs rated unsatisfactory, the next step was to demote those with a G-5 rating. There were fifteen employees in that category and all were demoted. Of the fifteen G-5 section chiefs, there were eight white males, two white females, two black males and three black females. The next step was to demote those

with a G-4 rating. Twenty of the twenty-five G-4 section chiefs had to be demoted. When ranked by seniority, the plaintiff was one of the twenty G-4 employees demoted. Because of her demotion on December 2, 1985, plaintiff returned to the position she held immediately prior to her promotion to section chief. A fairly substantial decrease in salary resulted. On March 7, 1988, plaintiff was placed on a disability pension and is no longer employed by the defendant.

On May 20, 1986, plaintiff filed a charge with the EEOC. The EEOC issued her a right to sue letter on June 10, 1987. Plaintiff then filed the instant suit on September 14, 1987. The above mentioned Motions for Summary Judgment were filed by defendant, and on November 1, 1989, the district court granted defendant AT&T's motions.

REASONS FOR GRANTING WRIT

The issuance of a writ of certiorari in this case is warranted because the Honorable Trial Judge and Appellate Court have decided a

federal question in a way that conflicts with applicable decisions of this Court and that of the Federal Court of Appeals.

Specifically, the Fifth Circuit Court of Appeals ruled that the facts of this case fell within the parameters of Lorance v. AT&T Technologies, Inc., 109 S. Ct. 2261 (1989), and Delaware state College v. Ricks, 449 U.S. 250 (1980). The key facts upon which the Fifth Circuit and the Trial Judge seized to hold that plaintiff's claim was untimely are as follows: (1) the September 30, 1985, meeting with her supervisor in which she was informed that she might be demoted because of her last rating and her seniority status within her rating group, (2) the December 2, 1985 date of actual demotion, and (3) the May 20, 1986, filing by plaintiff of her complaint with the EEOC.

The lower courts considered the September 30, 1985, meeting date as the benchmark for beginning the 6 month period in which to file a EEOC claim, and thus found the May 20, 1986,

filing untimely. Part of this reasoning was couched on the construction of the MAP program as one of "seniority". However, a close examination of MAP reveals it not to be solely a seniority, but a imaginative hybrid of evaluation and seniority which allows discrimination to occur. For example, plaintiff was demoted because of her seniority status within her rating group. Her rating group position was determined by the MAP evaluation procedure administered by AT&T. The conclusions to be drawn from the MAP system and its effect on seniority are that an employee never knows where he or she stands in terms of seniority, since the occupants of the particular rating group which she occupies are unknown to her, as MAP ratings are kept confidential. Thus, how can any particular MAP rating alert an employee that discrimination has occurred or that her seniority rights have been affected.

This key fact distinguishes this case from Lorance and Ricks, supra. In each of

these cases, the plaintiff was presented with information (denial of tenure or recalculation of seniority) that clearly and immediately affected their seniority status, thus, placing them in a more precarious employment position.

But, it is not until the actual demotion occurs that the impact of the MAP rating is brought home to the employee. Only at this point does the employee become aware of the interrelationship between MAP and seniority. Such a system is ripe for insidious discrimination, as MAP ratings can be manipulated to place an employee in a disfavorable seniority position that will be the first casualties of any employee layoffs or demotions.

By failing to make this distinction, the lower courts have overlooked the continuing violation nature of the MAP process, which arises when a persisting and continuing system of discriminating practices produces effects that may not manifest themselves as individually discriminatory except in

accumulation over a period of time. Trevino v.Celanese Corp., 701 F. 2d 397 (Fifth Circuit 1983).

In the Fifth Circuit, further, it has been recognized that equitable considerations may very will require that the filing periods do not begin to run until facts supportive of a Title VII charge or Civil Rights action should be apparent to reasonably prudent persons similarly situated. A finding of continuous violation of civil rights is mandated where the employers ambiguous acts served to abscure the existence of an unlawful policy and fail to alert the average lay person to act to protect his rights. Abrams v. Baylor College of Medicine, 805 F.2d. 528 (Fifth Circuit 1986).

In Berry v. Board of Supervisors, 715 F. 2d. 971, (Fifth Circuit 1983), the court identified three factors that are relevant to determining whether a continuing violation has occurred. They are:

"The first is subject matter. Do the

alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is frequency. Are the alleged acts recurring (e.g., a bi-weekly paycheck) or more in the nature of an isolated work assignment or employment decision? The third factor, perhaps of utmost importance, is the degree of permanence. Does the act have the degree of permanence which should trigger an employees' awareness of and duty to assert his or her rights?"

In this case, the plaintiff was subjected to a annual performance evaluation which gave her a particular rating. However the significance of the rating, and its relationship to seniority status, was never apparent to plaintiff until her demotion on December 2, 1985. Until that date, the plaintiff had no realization of the interrelationship of her rating with seniority and her other employees. Further, until that date, she had no concrete facts that she was definitely going to be demoted. The

information which was conveyed to her on September 30, 1985, was that she "possibly" might be demoted because of her G-4 rating.

In Glass v. Petro-Tex Chemical Corp., 757 F. 2d. 1554 (Fifth Circuit 1985), the defendant similarly alleged that the plaintiff's discrimination complaint was untimely. As to this issue, the Court stated:

"A reasonable prudent employee, one who is reasonably ambitious, conscientious, and trusting, as the record reveals Ms. Glass to have been, will not necessarily conclude that her employer is an illegal discriminator on the basis of one conversation and one act that is at least arguably non-discriminatory. Without additional evidence, she is just as likely as not to give her employer the benefit of the doubt and, in so doing, strive to disconfirm her own suspicions. Taking all of this into account, the district court in essence found that Ms. Glass need not have known of the 1969 discrimination as actionable, and need not have abandoned her

hopes for a promotion, until she was discriminated against again, in 1974, at which time she finally realized that her desire for promotion was hopeless because of Petro-Tex's continuing policy against promotion of women to supervisory positions in the Treasury Department."

In Abrams, supra, the Court held that the plaintiff did not have enough information at the time the defendants argued the complaint should be filed, by which a "reasonably prudent person similarly situated" could have realized that she was the victim of illegal discrimination. A more apt description of the plight of Theola Davis cannot be found. She too did not have enough information upon which to conclude she was a victim of discrimination until December 2, 1985. Thus, her filing of a claim with the EEOC on May 20, 1986 was timely and within the 180 day statutory limit.

Although not considered by the Fifth Circuit, the Trial Judge held that plaintiff had failed to create a genuine issue of

material fact as to the presence of discriminatory animus as to her claim of disparate treatment. The Trial Judge relied heavily upon the affidavit analysis of Dr. Arnold Levine, defendant's expert witness. Dr. Levine's affidavit sets forth that he based his analysis upon information supplied to him by AT&T, which included a list of section chiefs, together with their race, sex, effective service date, date of promotion, past ratings and work history. He clearly stated in his affidavit that his analysis was based upon that data.

But noticeably absent from consideration of Dr. Levine's analysis was a evaluation of MAP, which generated the ratings used in his regression analysis. Since Dr. Levine failed to analyze whether MAP was an objective, non-discriminatory appraisal system, his conclusions are seriously flawed.

It is clear from the depostion and report of Dr. Richard M. Flicker, plaintiff's expert, that black and female section chiefs were

demoted by AT&T in higher percentages than whites and males. Dr. Flicker noted his concerns in this regard in his deposition, as follows:

"So the test becomes the performance rating. We have shown, or I believe my statistics show, that blacks and females were demoted, black and female section chiefs were demoted in higher percentages than whites and males, and there was adverse impact in the demotion. Now it becomes a question of: Was the method of demoting job relevant or seniority or whatever the particular issues will boil down to , did the form that was used in evaluation their job performance, was it job relevant; was it statistically, a sound instrument? We know that blacks and females were demoted in greater percentages. Also, my statistical comparisons of black and white, male and female scores on the performance evaluation that they had , which I have not seen, I have only seen the composite score , blacks score lower in their performance

evaluations that whites, and females lower than males. So both the fact that there were greater percentages of black females demoted, and the fact that the instrument that evaluated their performance, which has been the test for demotion , that that instrument, females and blacks don't do as well on that instrument , we get to the point of is that a good instrument; is it valid; is it job relevant?

You know,... it may be an excellent instrument -- that rating form may have been well developed -- but if nobody ever received any training in how to fill them out, then it is more likely that personal bias, prejudices could operate. No one can ever go into the mind of another individual, but if they have not been trained in the process of evaluating, then it is more likely that that could explain the bias. When I say bias, I mean why blacks score lower than whites on the ratings. Are they poorer employees, or are the raters underestimating their performance and

overestimating whites, or are ther showing a bias?"

The specific workings of the MAP system are too detailed to discuss here, but it suffices to say that the process is clearly subjective and administered chiefly by white males. One provision of the MAP program instructs the raters to not document any "direct or indirect references to race, sex, religion, age handicap or veteran status", and is preceded by the following directive:

"It is also important to know what not to document, since quality of documentation can make a difference. Here are things to avoid!"

Rather than emphasizing a gender and sex neutral administration of the MAP process, the guidelines focus on covering up any underlying prejudices of the rating supervisors.

In granting and affirming the Motions for Summary Judgment, the lower courts seemed to have forgotten the standard applied in employment discrimination situations. The

disposition of an employment discrimination case should be approached cautiously, since questions of motive and intent are involved which are often impossible to resolve in advance of trial. Baker v.Kaiser Aluminum and Chemical Corp., 608 F. Supp. 1315 (D.C. CA, 1984), Warren v. Quality Care Service Corp., 603 F. Supp. 1174 (D.C. N.Y. 1985). It is submitted that the lower courts have applied a less strict standard in this case inapposite to controlling case law.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted, and this case reviewed by this Honorable Court.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE BY MAIL

I, Robert Lee Curry III, a member of the bar of the Supreme Court of the United States and counsel of record for Theola Henson Davis, Petitioner herein, hereby certify that on September 18, 1990, pursuant to Rule 29, Rules of the Supreme Court, I served three copied of the foregoing Petition for Writ of Certiorari on the other party to this suit, AT&T Information Systems, by depositing such copies in the United States Post Office, Monroe, Louisiana, with first class postage prepaid, properly addressed to Mr. Lake Hearne, Attorney for Defendant, 905 Louisiana Tower, Shreveport, LA 71101.

All parties required to be served have been served.

_____

Robert Lee Curry III

Date: September 18, 1990

APPENDIX A

Rule 56(c) - Fed. Rules of Civil Procedure

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

28 U.S.C. Sec. 1343(a)(4)

(a) The district courts shall have original jurisdiction of any civil action

authorized by law to be commenced by any person:

(4) To recover damages or to secure equitable or other relief under any Act of Congress prcviding for the protection of civil rights, including the right to vote.

42 U.S.C. Sec. 2000e-5(e)

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of a unlawful employment practice withe respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice

thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF LOUISIANA

SHREVEPORT DIVISION

THEOLA HENSON DAVIS NO. 87-2013

VERSUS

AT&T INFORMATION SYSTEMS HON. TOM STAGG

MEMORANDUM RULING

Plaintiff alleges that defendant discriminated against her on the basis of race and sex with respect to performance evaluation, demotion and salary, in violation of Title VII of the Civil Rights

Act of 1964, 42 U.S.C. 2000e et seq. Before the court are two motions for summary judgment filed by defendant alleging that (1) plaintiff's claims are untimely; and (2) there are no genuine issues of material fact and defendant is entitled to judgment on the merits.

The affidavits, depositions and stipulations in the pretrial order establish the following facts. Plaintiff was employed on March 21, 1966, in the manufacturing area of the local AT&T plant and was upgraded twice before being promoted to section chief (supervisor of a particular assembly line) on September 17, 1973.[1] On December 2, 1985 AT&T experienced a large downsizing which resulted in laying off 3,000 employees. In addition to the layoffs, a number of section chiefs were demoted or moved to other positions.[2] Demotion of the 35 section chiefs was done on the basis of their performance appraisal ratings and,

within the group of like-rated section chiefs, by seniority.

Performance was appraised under defendant's Management Appraisal Program (hereinafter, MAP). Under MAP, there were four categories of performance: (1) outstanding; (2) very good (3) good; and (4) unsatisfactory. The "good" category was subdivided into five parts: G-1 through G-5. Performance ratings resulted from the immediate supervisor's assessment and a review by three successively higher levels of management. The appraisal process was conducted annually, usually concluding late in the year; however, with the pending work force adjustment at the end of 1985, the process was concluded in August and September of that year.

Lower rated section chiefs were demoted first. Since there were no section chiefs rated unsatisfactory, the next step was to demote those with a G-5 rating. There were fifteen employees in that

category and all were demoted. Of the fifteen G-5 section chiefs, there were eight white males, two white females, two black males and three black females. The next step was to demote those with a G-4 rating. Twenty of the twenty-five G-4 section chiefs had to be demoted. When ranked by seniority, the plaintiff was one of the twenty G-4 employees demoted.[3] Because of her demotion, plaintiff returned to the position she held immediately prior to her promotion to section chief. A fairly substantial decrease in salary resulted. On March 7, 1988, plaintiff was placed on a disability pension and is no longer employed by the defendant in any capacity.

Plaintiff concedes that a charge must be filed with the EEOC within 180 days after the occurrence of the alleged unlawful employment practice.[4] Under established federal law, the 180-day limitations period for Title 7 claims

begins to accrue when the plaintiff knows or reasonably should know the discriminatory act has occurred. Cervantes v. IMCO, 724 F.2d 511, 513 (5th Cir. 1984). The 180-day period begins when the decision is made and plaintiff is notified. Id. at 514. The Supreme Court has emphasized that the proper focus is upon the time of the discriminatory act, not upon the time at which the consequence of that act becomes most painful. Lorance v. AT&T Technologies, Inc., 109 S. Ct. 2261, 2266 (1989); Delaware State College v. Ricks, 449 U.S. 250, 101 S. Ct. 498, 504 (1980). To determine the timeliness of plaintiff's actions in prosecuting this case, the court must identify precisely the unlawful practice of which plaintiff complains. Ricks, supra, at 503. A review of the pretrial order, plaintiff's deposition and her answers to interrogatories reveals that she contends that defendant's performance appraisal program discriminates against

black females. Plaintiff complains that as a result of this alleged discriminatory appraisal system, she was unjustly demoted.

It is clear that plaintiff's claim is untimely. Plaintiff admits in her deposition that she was aware of the rating procedure when she became a section chief in 1973. She also testified that she was aware of the problem of her low rating for at least six years:

Q. So you knew -- okay. So he drew the diagram out and you said, well, I knew I wasn't outstanding but I ought to be higher than G-4. Is that right?

A. Yes. I didn't say I knew I wasn't outstanding. I knew I wasn't rated outstanding. I am outstanding. But because I am black and a female, I feel that is why I never received an outstanding rating.

Q. Okay. You knew that you were not rated outstanding for how long, how many years?

A. The whole twelve years I was section chief.

Q. Okay. And for those twelve years you were not rated outstanding, how many of those twelve years did you feel like you should have been rated outstanding?

A. I would say six.

* * *

Q. Okay. Do you have -- for each of those six years did you feel that your failure to receive an outstanding rating was because of your race or your sex?

A. Yes.

Q. Did you file an EEOC charge six years ago?

A. No.

Q. Or I guess it would have been 1979 or so.

A. No.

Q. Why did you not file an EEOC charge then?

A. I was trying to work within the system and work out the problems with my managers. I am committed and I am a very dedicated person. I do not like to create problems within my organization or in my work.

Plaintiff's deposition, pages 54-56.

Notwithstanding plaintiff's belief that for a least six years her rating was lower than similarly situated whites because of her race and sex, she waited until approximately May 20, 1986 before filing an EEOC charge. In doing so, plaintiff apparently assumed that the 180-day period began running December of 1985 -- the date of her demotion. However, plaintiff's demotion in December of 1985 was a consequence of defendant's alleged discriminatory appraisal system, not the discriminatory act itself. At the very latest, therefore, plaintiff was required to file an EEOC charge on or before March 31, 1986, within 180 days the date she

discussed her last rating, and the possible consequence of that rating, with her supervisor.

The court finds that plaintiff's demotion was a consequence of her alleged discriminatory rating, not the alleged discriminatory act. Indeed, plaintiff's complaint alleges that "[a]s a result of her lower job performance rating, plaintiff was demoted . . .". Complaint at ¶ 12. Plaintiff's only asserted justification for not filing an EEOC charge timely was that she does not like to "create problems" within her job. Plaintiff's deposition at 56. It is clear, however, that mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination. Ricks, supra. In response to the motion for summary judgment, plaintiff has offered no facts which would toll the running of the 180-day period.[5]

In sum, plaintiff has an obligation to

file a charge with the EEOC within 180 days of the discriminatory act complained of. She did not do so. Although plaintiff's injury became more concrete upon her demotion, that fact does not change the fundamental focus of inquiry: when plaintiff knew or reasonably should have known that a discriminatory act had occurred. Courts have rejected the concept of harm as the point of reference for liability. Lorance, supra, at 2266, n. 3. Because plaintiff has not come forward with significant probative evidence demonstrating the existence of a triable issue of fact, summary judgment is appropriate.

Even if plaintiff had timely filed an EEOC charge, summary judgment would still be appropriate on the merits. Plaintiff relies upon both disparate impact and disparate treatment theories of discrimination. Again, however, plaintiff has come forward with no evidence

sufficient to create a genuine issue of a material fact in response to defendant's motion for summary judgment.

As mentioned, plaintiff identified the challenged employment practice as being the performance rating system used by AT&T. In answers to interrogatories, plaintiff contends that the appraisal system is totally subjective, and provides little or no guidelines to the evaluator. The Supreme Court in Watson v. Ft. Worth Bank & Trust, 108 S. Ct. 2777, 2789 (1989), held that disparate impact analysis is applicable to subjective employment criteria. Plaintiff must still establish a prima facie case, however.

Plaintiff's case is premised upon the theory that defendant's appraisal system is discriminatory because there is a disparity in the ratings of blacks versus whites and females versus males. To support this theory, plaintiff engaged Dr. Richard M. Flicker, an industrial psychologist.

Plaintiff concedes that Dr. Flicker has not performed sufficient analysis to establish disparate impact, including standard statistical analysis. Plaintiff, however, seeks to excuse this lack of analysis by stating that Dr. Flicker had not had sufficient data at the time of his deposition upon which to perform such an analysis. The gist of plaintiff's opposition to defendant's motion is that Dr. Flicker "feels" that the current evaluation system at AT&T has a disparate impact upon blacks.

In contract, AT&T offers the affidavit and analysis of Dr. Arnold Levine in support of its motion for summary judgment. Dr. Levine, an expert in the field of statistics and probability, performed multiple regression analysis to evaluate the impact of various factors on AT&T's performance appraisals. Dr. Levine's analysis demonstrates that neither race nor sex influenced the 1984 or 1985 rating

values, while job seniority was a significant factor. Indeed,t he results suggest that any differences observed by race and sex are due to the fact that blacks and females have less job seniority. Dr. Levine's analysis supports the defendant's contention that race and sex are not statistically significant factors influencing plaintiff's appraisal rating at AT&T.

Plaintiff's brief opposition to the motion for summary judgment is insufficient to create a genuine issue of material fact. In the face of defendant's motion for summary judgment, plaintiff was required to affirmatively designate specific facts demonstrating the need for trial. Plaintiff's opposition does not meet that burden.

Plaintiff's opposition to defendant's motion for summary judgment does not address defendant's contention that there is no genuine issue of material fact with

respect to plaintiff's claim for disparate treatment. A disparate treatment claim is one in which an employee alleges that she has been treated less favorably than her peers because of her race or sex. Thus, in a disparate treatment case, plaintiff must prove discriminatory animus. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981). As discussed supra, plaintiff's statistical evidence is clearly insufficient to create a genuine issue of material fact on this point. In her deposition, plaintiff was unable to articulate any discriminatory act against her. The only incident offered by plaintiff was one occasion when a department chief used the phrase "kick some butts". Clearly, this is insufficient to satisfy plaintiff's burden of coming forth with evidence sufficient to create a genuine issue of material fact. Plaintiff must do more than simply show there is some metaphysical doubt as to the material

facts. Matsushita Electric Industrial Company v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 1356-57 (1986). Therefore, on the basis of the affidavits, depositions and briefs, the court concludes that there are no genuine issues of material fact and defendant is entitled to judgment as a matter of law. Nunez v. Superior Oil Company, 572 F.2d 1119, 1124 (5th Cir. 1979). Accordinly, the defendant's motions for summary judgment are granted.

An order consistent with the terms of this Memorandum Ruling shall issue herewith.

Thus done and signed in chambers, at Shreveport, Louisiana, on this 1st day of November, 1989.

S/Judge Tom Stagg

FOOTNOTES

1. Plaintiff was the first black female promoted to section chief at defendant's Shreveport plant.

2. A total of 50 section chiefs were moved as a result of downsizing: 15 section chiefs retired, 3 voluntarily left AT&T's employ, and 35 were demoted. The parties have stipulated that the downsizing, including the demotion of sections chiefs, was a legitimate business necessity.

3. Plaintiff's ratings and her department chief for each available year were:

Year	Rating	Chief
1978	102 G-5	Jevicky
1979	100 G-5	Albritton
1980	102 G-5	Albritton
1981	104 G-5	Albritton
1982	102 G-5	Albritton
1983	102 G-5	Albritton
1984	104 G-4	Albritton
1985	104 G-4	Roelofs

4. 42 U.S.C. § 2000e-5(e).

5. Plaintiff appears to allege that defendant's activities constitute a continuing violation of Title VII.

However, considering the subject matter, frequency and degree of permanence of the defendant's appraisals, the violation, if any, cannot be considered continuing. Each appraisal was in the nature of an isolated employment decision which would have triggered a reasonable employee's awareness of her duty to assert her rights. Plaintiff has failed to create a genuine issue of material fact on this point. Cf. Rendon v. AT&T Technologies, 833 F.2d 388 (5th Cir., 1989).

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF LOUISIANA

SHREVEPORT DIVISION

THEOLA HENSON DAVIS No. 87-2013

VERSUS

AT&T INFORMATION SYSTEM HON. TOM STAGG

O R D E R

For the reasons assigned in the foregoing Memorandum Ruling,

IT IS ORDERED that defendant's motions for summary judgment are granted.

Thus done and signed in chambers at Shreveport, Louisiana, on this 1st day of November, 1989.

S/Tom Stagg, Chief Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 89-4896

Summary Calendar

THEOLA HENSON DAVIS Plaintiff-Appellant

versus

AT&T INFORMATION SYS. Defendant-Appellee

Appeal from the United States District Court for the Western District of La.

(CV-87-2013) (May 25, 1990)

Before BREAVLEY, KING and JOHNSON, Circuit Judges.

PER CURIAM:

Plaintiff-appellant, Theola Henson David (Davis), filed a claim against defendant-appellee, AT&T Information

Systems (AT&T), alleging discrimination under Title VII. AT&T filed two motions for summary judgment: one claiming that Davis' complaint was not filed in a timely manner and the second asserting that no material issues of fact existed. The district court granted such motions and Davis appeals. We affirm the district court's judgment based on its conclusion that Davis' EEOC charge was not filed in a timely manner. We need not address the other ground for its judgment.

I.

Davis was employed by AT&T in 1966 in the manufacturing area of its local plant. On September 17, 1973, she was promoted to the position of section chief (i.e., supervisor of a particular assembly line).[1] During her tenure in this position, she was reviewed and rated under AT&T's Management Appraisal Program (MAP). Under the operative MAP, once per year her performance was rated by her immediate

supervisor. Such rating was reviewed by three superior levels of management. In general, an employee's supervisor appraised the employee's work as falling within one of the following four categories: (1) outstanding, (2) very good, (3) good, or (4) unsatisfactory. For example five subcategories, G-1 through G-5 (G-1 being the highest), existed under the category of "good". In September 1985, Davis received a G-4 rating.

In 1985, AT&T engaged in a large "downsizing" and, untimately, laid off over 3,000 people. At the same time, AT&T repositioned a number of section chiefs. Based on their performance ratings (and seniority within the ranks of those with identical performance ratings), thirty five section chiefs were demoted.

As no section chiefs had received the rating of "unsatisfactory," AT&T first demoted all fifteen sections chiefs in the G-5 subcategory. Then, using seniority as

its criterion, it demoted twenty of the twenty five section chiefs with the rating of G-4. As Davis fell within this category on December 2, 1985, she was put pack in the position she had previously held. She suffered a significant decrease in salary as a result of this move.[2]

On approximately May 20, 1986, Davis filed a charge with the Equal Employment Opportunity Commission (EEOC). The EEOC issued her a right to sue letter on or about June 10, 1987. Davis then filed the instant suit on September 14, 1987. In response, on August 4, 1989, AT&T filed a motion for summary judgment alleging that Davis had failed to file a charge with the EEOC in a timely manner. AT&T filed an additional motion for summary judgment on September 5, 1989 in which it claimed that Davis had failed to make a prima facie case that AT&T had engaged in in acts of unlawful discrimination. On November 1, 1989, the district court granted AT&T's motions for summary judgment.

II.

We use the same standards as the district court in assessing the propriety of a grant of summary judgment. Brooks, Tarlton, Gilbert & Kressler v. United States Fire Ins. Co., 832 F.2d 1358, 1364 (5th Cir. 1987). As a result, we will only affirm a district court's holding in favor of summary judgment if "we are convinced, after an independent review of the record, that 'there is no genuine issue of material fact' and that the movant is 'entitled to a judgment as a matter of law.'" Id. (quoting Fed. R. Civ. P. 56(c)). In keeping with this standard, we consider the evidence presented in the light most favorable to the non-moving party. See Baton Rouge Constr. v. Jacobs Constructors, 804 F2d 879, 881 (5th Cir. 1986)(per curiam). Where a question of law is dispositive, we operate in the same manner as we would outside of the summary judgment context; that is, we engage in a de novo review. Brooks, 832 F.2d at 1364.

III.

Davis now appeals the decision of the district court on two grounds: (1) she argues that the district court erred in finding that she had not filed her charge with the EEOC in a timely manner; and (2) she contends that the district court was in error in finding that no material issue of fact existed. As we find that the district court reached the correct conclusion in relation to the untimeliness of Davis' EEOC charge, we need not reach the second of these contentions.

Davis received her last review under MAP at the end of September 1985. According to Davis' deposition, at that time her supervisor told her that those section chiefs with G-5 ratings were "gone" (i.e., had either been down-graded or had retired) and that "the 4' are next."[3] The supervisor also informed her of her G-4 rating.[4] Davis claims that she then questioned her supervisor about why she had received the rating of G-4.

Subsequently, in December 1985, Davis was demoted. In the spring of 1986, she filed a charge with the EEOC. The filing was within 180 days of her demotion, but more than 180 days post her last MAP review. The district court found that her complaint was untimely because she should have filed with the EEOC within 180 days of her last MAP review. It based this conclusion on its finding that the record demonstrated that her complaint, in essence, claimed that AT&T's MAP - not the manner in which the actual demotion took place - discriminated against black women. Thus, the last MAP review constituted the most recent discriminatory act.

Our review demonstrates that the district court correctly interpreted the apposite case law. Under this circuit's law, it is well settled that the 180 day period for filing Title VII claims begins to accrue at the point that the complaining party knew or should have known of the

occurrence of a discriminatory act. Cervantes v. IMCO, Halliburton Serv., 724 F.2d 511, 513 (5th Cir. 1984).

Two Supreme Court cases are particularly useful in applying the above tenant and interpreting the running of the limitations period. The first Delaware State College v. Ricks, addressed the timeliness of a Title VII complaint by a professor (Ricks) who was denied tenure in the spring of 1984 but was actually terminated at the end of the following academic year (after he completed a one-year "terminal" contract). 449 U.S. 250 (1980). The court held that the limitations period began to run with the denial of tenure rather than the final termination:

> "It appears that termination of employment at Delaware State is a delayed, but inevitable, consequence of the denial of tenure. In order for the limitations period to commence

with the date of discharge, Ricks would have to have allege and prove that the manner in which his employment was terminated differed discriminatorily from the manner in which the College terminated other professors who also had been denied tenure.

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In sum, the only alleged discrimination occurred--and the filing limitations period therefore commenced--at the time the tenure decision was made and communicated to Ricks. That is so even though one of the <u>effects</u> of the denial of tenure--the eventual loss of a teaching position did not occur until later.

Id. at 258 (footnote omitted). Thus, the Ricks decision militates for finding that the 180 day limitation period beings to run when the allegedly discriminatory act takes place - not when the consequences of the alleged act become apparent.

A more recent Supreme Court case, Lorance v. AT&T Technologies, Inc., also supports a finding that the limitations period begins to accrue at the time a supposedly discriminatory act takes place rather than when the consequences of such act become clear. 109 S. Ct. 2261 (1989). In Lorance, women, who worked as "testers" at a particular AT&T site and who had received demotions in 1982 that they would not have but for a 1979 change in the manner in which tester seniority was calculated, sued claiming discrimination on the basis of sex. 109 S. Ct. at 2261. Citing Rucks, inter alia, the Supreme Court found that "petitioners . . . have asserted a claim that is wholly dependent on the

discriminatory conduct occurring well outside the period of limitations, and connot complain of a continuing violation." Id. at 2267.[5]

In the instant case, Davis's complaint alleges that she "received a lower job performance rating because of her race, black and her sex, female[]" and that "[a]s a result of her lower job performance rating, [she] was demoted, while similarly situated and qualified white and male sections chiefs were not." Moreover, in her deposition, Davis stated that for six of the twelve years that she was a section chief she felt that she had deserved a rating of outstanding, but that because she was a black woman, she did not receive such ratings. An excerpt of her testimony to this effect follows:[6]

Q. So he drew the diagram out and you said, well, I knew I wasn't outstanding but I ought to be higher than G-4. Is that right?

A. Yes. I didn't say I knew I wasn't outstanding. I knew I wasn't rated outstanding. I am outstanding. But because I am black and female, I feel that is why I never received an outstanding rating.

Q. Okay. You knew that you were not rated oustanding for how long, how may years?

A. The whole twelve years I was section chief.

Q. Okay. And for those twelve years you were not rated outstanding, how many of those twelve years did you feel like you should have been rated outstanding?

A. I would say six.

* * *

Q. Okay. Do you have - for each of those six years did you feel that your failue to receive an outstanding rating was because of your race or your sex?

A. Yes.

Q. Did you file an EEOC charge six years ago?

A. No.

Q. Or I guess it would have been 1979 or so.

A. No.

Q. Why did you not file an EEOC charge then?

A. I was trying to work within the system and work out the problems with my managers. I am committed and I am a very dedicated person. I do not like to create problems within my organization or in my work.

Clearly, Davis alleges that the MAP ratings were discriminatory. The materials in the record do not, however, indicate that Davis also alleges that the actual demotion was itself carried out in a discriminatory manner. Rather, she appears only to assert that the demotion resulted from an allegedly discriminatory rating system. As such, the instant case appears to fall

within the parameters of Lorance and Ricks and we are constrained to conclude that Davis' complaint, filed in May, 1986, was not timely.

IV.

For the foregoing reasons, we affirm the judgment of the district court granting summary judgment to AT&T.

AFFIRMED.

FOOTNOTES

1. Davis was the first black woman to be promoted to this position.

2. Ultimately, on March 7, 1988, Davis received a disability pension and ceased working for AT&T.

3. While Davis' deposition testimony states that her supervisor told her that G-4s "are next," her notes in the record only indicate that she was told that the G-4s might be next.

4. According to Davis, this review was the first time she had been informed as to the details of the rating system.

5. In reaching this conclusion, the Supreme Court explicitly rejected the notion, propounded by dissenters in Lorance, that Lorance should be distinguished from Ricks because the termination of the professor in Ricks was inevitable unlike the demotion of the employees in Lorance. In the Court's words:

> The dissent attempts to distinguish Delware State College V. Ricks, 449 U.S. 250, ... (1980), on the ground that there "[t]he allegedly discriminatory denial of tenure ... served notice to the plaintiff that his termination a year later would come as a 'delayed, but inevitable, consequence.'" Post, at 2272 (emphasis in original)(citation omitted). This builds on its earlier criticism that "[o]n the day AT&T's seniority system was adopted, there was no reason to believe that a woman who exervised her

plantwide seniority to become a tester would ever be demoted as a result of the new system," so that at that point the prospect of petitioners's uffering "concret[e] harm" was "speculative." Post, at 2270 (emphasis in original). Of course the benefits of a seniority system, like those of an insurance policy payable upon the occurrence of a noninevitable event, are by their nature speculative - if only because they depend upon the employee's continuing desire to work for the particular employer. But it makes no more sense to say that no "concrete harm" occurs when an employer provides a patently less desirable seniority guarantee than what the law requires, than it does to say that no concrete harm occurs when an insurance company delivers an accident insurance policy with a face value of $10,000, when what has been paid for is a face value

> of $25,000. It is true that the injury to the employee becomes substantially more concrete when the less desirable seniroity system causes his demotion, just as the injury to the policy-holder becomes substantially more concrete when the accident occurs and the payment is $15,000 less than it should be. But that is irrelevant to whether there was any concrete injury at the outset. What the dissent means by "concrete harm" is what Ricks, supra, 449 U.S. at 258, 101 S. Ct. at 504, referred to as the point at which the injury becomes "most painful" - and that case rejected it as to the point of reference for liability. Accord, Chardon v. Fernandez, 454 U.S. 6, 8 ... (1981) (per curiam).

Lorance v. AT&T Technologies, Inc., 109 S. Ct. 2261, 2266 n.3 (1989).

6. We also note that in her brief, Davis contends that the excerpted testimony cannot be used in assessing when she became aware of a problem with her ratings as such testimony "was given in the context of expressing her reasons why she failed to receive an outstanding rating." We do not see the logic behind Davis' argument. Her statements indicate that it was her belief that she did not receive a rating of outstanding because of her sex and race. This consitutes an allegation that the rating system operated in a discriminatory manner. She also claims that it is not clear from the deposition testimony that "her belief that she was discriminated against existed for each of the six prior years, or whether that was a conclusion that she reached after learning of the workings of the management appraisal system." However, her actual deposition testimony belies this argument: For example, she indicated that she had not

filed an EEOC charge in 1979 because she was trying to "work within the system and work out the problems with my managers." Moreover, at her deposition, she responded affirmatively to an inquiry as to whether she had "a problem in 1981" with her rating. While this testimony does not indicate that Davis believed that she was discriminated against in each of the six years prior to the suit, it does indicate that at least as far back as 1979, she believed that there were problems with the rating system.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 89-4896

THEOLA DAVIS HENSON Plaintiff-Appellant

versus

AT&T INFORMATION SYS. Defendant-Appellee

Appeal from the United States District Court for the Western District of La.

ON PETITION FOR REHEARING

(June 20, 1990)

Before REAVLEY, KING and JOHNSON,

Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

S/Carolyn Denun King, U.S. Circuit Judge